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10/065,326

10/03/2002

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| EXAMINER |
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KIM, JENNIFER M

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| ART UNIT | PAPER NUMBER |
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1617

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08/09/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

|                              |                                      |                                      |  |
|------------------------------|--------------------------------------|--------------------------------------|--|
| <b>Office Action Summary</b> | <b>Application No.</b><br>10/065,326 | <b>Applicant(s)</b><br>ZICKER ET AL. |  |
|                              | <b>Examiner</b><br>Jennifer Kim      | <b>Art Unit</b><br>1617              |  |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 25 May 2007.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-11 is/are pending in the application.
- 4a) Of the above claim(s) 8 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-7, 9-11 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date <u>5/25/2007</u> . | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

The amendment filed on May 25, 2007 have been received and entered into the application.

### **Action Summary**

The rejection of claims 9 and 10 under 35 U.S.C. 102(b) as being anticipated by Ishihara et al. (U.S.Patent No. 6,297,280 B1) of record is hereby expressly withdrawn in view of Applicant's amendment. Claim 1 was also rejected in this rejection but it was inadvertently left out in the previous Office Action.

The rejection of claim 11 under 35 U.S.C. 103(a) as being unpatentable over Ishihara et al. (U.S.Patent No. 6,297,280 B1) of record is hereby expressly withdrawn in view of Applicant's amendment. Claim 1 was also rejected in this rejection but it was inadvertently left out in the previous Office Action.

The rejection of claims 1- 7 and 9-10 under 35 U.S.C. 103(a) as being unpatentable over Davenport et al. (A) (WO 2004/006688A1) of record in view of Davenport et al. (B) (US 2003/0194478A1) of record is being maintained for the reasons stated in the previous Office Action.

Art Unit: 1617

Upon further consideration following additional rejections have been in this Office Action. Therefore, this Office Action is made non-final.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-5, 7 and 9-11 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-20 of copending Application No. 10/912,864. Although the conflicting claims are not identical, they are not patentably distinct from each other because the animal population (an animal) to be treated in the instant claims overlap and encompasses the specific population (a dog having osteoarthritis) of claims in the copending Application. Further, the instant claims and the claims in the copending Application involves same method

Art Unit: 1617

step of administering same active agent. As such, the claimed method for influencing behavior in an animal would obviously achieved upon administration of the same active agent to the overlapping population involving same method step taught by the copending claims.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claims 1-5, 7 and 9-11 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 7, 13, 19 and 26-29 of copending Application No. 11/057,718. Although the conflicting claims are not identical, they are not patentably distinct from each other because the animal population (an animal) to be treated in the instant claims overlap and encompasses the specific population (a dog having arthritis) of claims in the copending Application. Further, the instant claims and the claims in the copending Application involves same method step of administering same active agent. As such, the claimed method for influencing behavior in an animal would obviously achieved upon administration of the same active agent to the overlapping population involving same method step taught by the copending claims.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Art Unit: 1617

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1- 7 and 9-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Davenport et al. (A) (WO 2004/006688A1) of record in view of Davenport et al. (B) (US 2003/0194478A1) of record.

Davenport (A) teaches a method for moderating the behavior of a healthy dog comprising feeding a high quality diet containing a high amount (behavior moderating amount) of DHA and EPA (omega-3 fatty acids). (page 4, lines 5-8, page 8, lines 3-17, page 10, line 3). Davenport teaches the emotional reactivity and behavior of dogs is thought to be influenced by the specific content of their food. (page 2, 2<sup>nd</sup> paragraph). Davenport teaches the diet can be formulated as to be dry (e.g. in kibble or other form) (dry matter). (page 6, last full-paragraph). Davenport teaches that the high quality diet comprises at least about 0.15% DHA and at least about 0.15%EPA, all by weight of the diet. (claim 10). Davenport teaches the diet can be formulated up to 0.25% of DHA, and up to about 0.25% of EPA. (page 8, 1<sup>st</sup> and 2<sup>nd</sup> full paragraph). Davenport teaches that the age the tested dogs were older than 6 month. (page 10, lines 10-12).

Davenport (A) does not teach the administration of a formulation comprising at least about 0.5% DHA and EPA for influencing behavior in the animal, and does not teach the specified age of the dog set forth in claims 3, 4 and 7.

Davenport et al.(B) teach a method for increasing the hunt performance including perception, responsiveness, alertness, target detection of a hunting mammal (dogs or cat) which includes orally administering to the mammal an effective amount of a diet

Art Unit: 1617

comprising unsaturated fatty acid EPA, DHA or both in a total amount of the diet greater than about 0.20 weight percent. (abstract, [0065]). Davenport et al. (B) teaches that the composition has a total amount of unsaturated fatty acids EPA, DPA and DHA of about 0.5 to about 0.55 weight percent. (page 9, claim 47).

It would have been obvious to one of ordinary skill in the art to modify the amounts of DHA and EPA in Davenport (A) up to about 0.5 to 0.55% for influencing behavior in dog because (A) teaches the composition of EPA and DHA are useful for influencing behavior in dog in each amount up to 0.25% weight; and because Davenport et al. (B) teach that the unsaturated fatty acids for the behavior modification use can be employed in the total amount of about 0.5 to 0.55 weight percent is safe and effective. There is an expectation of successfully influencing behavior in dogs with the claimed total amount of omega-3 fatty acids (DHA and EPA) because the each of the maximum amount of DHA and EPA by Davenport (A) in a single composition is not only employed for the same purpose but it is safe and effective as taught by Davenport (B). One would have been motivated to employ maximum amount of each of DHA and EPA taught by Davenport (A) in a single composition with a reasonable expectation of success in influencing behavior of an animal in order to achieve a highly unsaturated fatty acids that is safe and effective for the animals as taught by Davenport (A) and (B). With regard to the specified range of the ages set forth in claims 3, 4 and 7, such is obvious because Davenport teach that the dogs tested were over 6 month of age which would generally encompass the ages ranges set forth in the claims.

Art Unit: 1617

Claims 1-7 and 9-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reinhart (EP 0678247A1).

Reinhart teaches a pet food product containing omega-6 and omega-3 fatty acids from 3:1 to 10:1 and wherein at least 3% of the total fatty acids in the composition are the omega-3 fatty acids and that omega-3 fatty acids can be eicosapentaenoic acid and docosahexaenoic acid. (page 6, claims 1 and 2, claim 6). The amount of omega-3 fatty acid taught by Reinhart is within the amount set forth in claim 11. Reinhart teaches the product improved the general comfort and well-being of the animals. (page 6, lines 16-24).

Reinhart does not expressly teach the influencing behavior in an animal.

It would have been obvious to one of ordinary skill in the art that animals treated with the pet food product of Reinhart would influence the behavior of the animals because Reinhart teaches that pet food product improved the general comfort and well-being of the animals. One of ordinary skill in the art would recognize that the animals that have consumed such product would have better or different behavior because the product improved the general comfort and well-being of the animals. There is a reasonable expectation of successfully influencing behavior of the dog by providing comfort food that actually improves general comfort and well-being of the animals.

For these reasons the claimed subject matter is deemed to fail to patentably distinguish over the state of the art as represented by the cited references. The claims are therefore properly rejected under 35 U.S.C. 103.



None of the claims are allowed.

### **Response to Arguments**

Applicant's arguments filed May 25, 2007 have been fully considered but they are not persuasive. Applicant argues that a person having ordinary skill in the art would read and understand that Davenport (A) has already taught moderating the behavior of healthy dogs living in animal shelters by administering a diet containing 0.25% DHA, or a diet containing 0.25% EPA; thus, there is no need to provide both. This is not found persuasive because both references are in the field of Applicant's endeavor and pertinent to the particular problem with which the Applicant was concerned. In this case Davenport (B) et al. teaches additional formulation that can be employed to influence the behavior of an animal that is safe and effective. Therefore, it would have been obvious to one of ordinary skill in the art to modify the amount of DHA and EPA in Davenport (A) up to about 0.5% to 0.55% as taught in Davenport et al. (B) because Davenport et al.(A) teach that each of DHA and EPA can be employed in an amount of 0.25% and because the amount of DHA and EPA can be safely administered up to 0.5% to 0.55% to animals to influence behavior as taught by Davenport et al. (B). Applicant argues that the focus of Davenport (B) is physiological, rather than behavioral. This is not persuasive because Applicant's examples of "behavior" does not exclude physiological. Applicant's attention is drawn to the instant specification [0009], where the examples of altering behavior includes physiological activity such as circling,

Art Unit: 1617

aimless activity, interactions, agility and levels of activity. Applicant argues that the present application seeks to influence behavior, and is not directed to an animal's thermoregulation. This is not found persuasive because disclosed example of thermoregulation does not constitute a teaching away from a broader disclosure. In re Susi, 169 USPQ 423 (CCPA 1971). In this case it is clear that Davenport et al. teach a method for increasing hunt performance including perception, responsiveness, alertness, target detection of a hunting mammal comprising administration of a diet comprising unsaturated fatty acid EPA, and DHA in about 0.5 to about 0.55 weight percent. Therefore, one would have been motivated to combine these references and make such modification because they are drawn to same technical fields (constituted with same active ingredient and same use of influencing animal behavior), and pertinent to the problem which applicant concerns about. MPEP 2141.01(a). Thus, the claims fail to patentably distinguish over the state of the art as represented by the cited references.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jennifer Kim whose telephone number is 571-272-0628. The examiner can normally be reached on Monday through Friday 6:30 am to 3 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreenivasan Padmanabhan can be reached on 571-272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for

Art Unit: 1617

published applications may be obtained from either Private PAIR or Public PAIR.

Status information for unpublished applications is available through Private PAIR only.

For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Jennifer Kim  
Patent Examiner  
Art Unit 1617

Jmk  
August 2, 2007